



801 Second Avenue, Suite 614
Seattle, WA 98104
(206) 264-8207
(206) 264-8212 Fax

ANDREW M. KENEFICK

Senior Legal Counsel, Western Group
Admitted in Washington
Direct (206) 264-3062 Fax (866) 863-7961
akenefick@wm.com

September 27, 2004

VIA E-MAIL TO BMOO461@ECY.WA.GOV

Industrial Stormwater General Permit
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

RE: Comments on Proposed Revisions to Industrial Stormwater General Permit

Dear Ecology:

Waste Management of Washington, Inc. ("Waste Management") appreciates the opportunity to submit the following comments on the Department of Ecology's proposed revisions to the Industrial Stormwater General Permit (the "Permit"). Waste Management's comments are addressed to only those changes proposed and do not address other aspects of the Permit.

1. Condition S3.C.1: Waste Management disagrees with the inclusion of "uncontaminated" ground water or spring water in the list of conditionally approved non-stormwater discharges.

Permittees cannot be reasonably expected to be responsible for controlling, treating, or eliminating discharges consisting of contaminated ground water or spring water where such contamination originates off-site, either from another contaminated property or because of natural background conditions. By following the requirements proposed in Condition S3.C.2, to include and describe such discharges in the SWPPP, and by demonstrating through reasonable means that contaminants in such discharges are unrelated to regulated site activities, the permittee should have satisfied their obligations in this regard. Furthermore, there is no explanation or definition as to what "uncontaminated" means. Arguably, the presence of any material at any concentration in ground water or spring water would be considered a contaminant. To address this concern, we suggest that the reference to "uncontaminated" be deleted from the Condition S3.C.1.f.

2. Condition S4.A: Waste Management agrees with replacing the sample collection criteria with guidelines in the current draft

Waste Management supports the practical approach that Ecology has proposed for collecting samples. This approach reflects an understanding that periodic stormwater sampling can be difficult and inconsistent, given site and weather conditions.

3. **Condition S4.G: Ecology should not require monthly sampling for facilities that discharge into Section 303(d) or TMDL waterbodies.**

Waste Management strongly disagrees with the proposal to require monthly monitoring of stormwater discharges for facilities discharging to Section 303(d) listed waters or waters subject to TMDLs. Monthly monitoring – as compared to quarterly monitoring – is excessive, costly and unnecessary. This requirement will more than triple the burdens placed on permittees. For example, a permittee may be relatively confident that there will be sufficient rainfall during a quarter to collect a sample meeting the collection criteria; however, if sampling is required monthly, the permittee cannot be as certain that there will be sufficient rainfall to collect a sample meeting the collection criteria. As a consequence, the permittee will expend even greater resources trying to anticipate rainfall events. In addition, monthly sampling may have the unintended consequence of generating fewer samples that meet the collection criteria. Permittees will be more inclined to try to sample marginal rainfall events in order to ensure that at least one sample is obtained during the month. Finally, not only will the time and resources to perform the monitoring impose a significant burden on the regulated community, the paperwork burden will also be substantial.

Furthermore, this requirement will lead to significant confusion in the regulated community because facilities will now have two separate sampling obligations which vary by parameter sampled and frequency of sampling. For example, a facility discharging to a Section 303(d) water will might have to sample for TSS and pH every month, but then quarterly during one of those sampling events, it will need to also sample for turbidity, zinc, pH, and oil & grease. Ecology should simplify an already complicated monitoring programming by requiring only quarterly monitoring for all permittees.

4. **Condition S4.C (Level 1 Response): The Permit should allow more time to conduct a Level One Inspection.**

In Condition S4.C (Level 1 Response), a permittee is required to conduct an inspection within two weeks after receipt of sampling results showing values above benchmarks. Waste Management believes that the time period for conducting a facility inspection should be revised to “no later than two weeks after receipt of sampling results or the end of the quarter, whichever is later.” This change is necessary to allow for circumstances where a facility may take more than one sample during a quarter. If the facility takes a sample at the beginning of the quarter and again toward the end of the quarter, the facility will not know whether a benchmark has been exceeded until the final sample results are received and the results averaged. Furthermore, if the facility plans, but is unable, to take a second qualifying sample prior to the end of the quarter, it will have violated this condition because it did not conduct an inspection after an initial benchmark exceedance.

5. **Condition S4.C (Action Levels): The existence of an Action Level for a particular parameter does imply that sampling of that parameter is required.**

The General Permit should clarify that the existence of an action level for a particular parameter does not imply that sampling for that parameter is required. For example, most facilities are not required to sample and analyze for BOD5. Yet, the presence of an action level for BOD5 could imply an obligation to monitor for BOD5.

6. **Condition S4.C (Action Levels): Level 2 or Level 3 Responses should only be triggered if there are exceedances of the same parameter.**

Condition S4.C should be revised to clarify that the trigger for a Level 2 or Level 3 Response requires sampling results above action levels for the **same** parameter. As drafted, the Permit might be interpreted to require a Level 2 Response if there is a zinc exceedance in one quarter, followed by a pH exceedance in the following quarter. Waste Management recommends the following revisions:

Action Levels
If two out of the four previous quarterly sampling results are above the action levels <u>for the same parameter</u> identified below, the permittee shall proceed with a level two response. If four quarterly samples collected after (effective date of permit modification) are above the action levels <u>for the same parameter</u> identified below, the permittee shall proceed with a level three response.

Level Two Response
A level two response shall be immediately initiated whenever two out of the previous four quarterly sampling results <u>for the same parameter</u> collected after (effective date of permit modification) are above the action levels identified above...

Level Three Response
If four quarterly samples collected after (effective date of permit modification) are above the action levels <u>for the same parameter</u> identified above, the permittee shall immediately initiate a level three response....

7. **Condition S4.C (Level Two Response): Ecology should clarify that Action Level exceedances only trigger a Level Two Response once.**

Further clarification is necessary with respect to the trigger for a Level 2 Response. Specifically, Waste Management recommends that the General Permit clarify that once a Level 2 Response is triggered, the same sampling results do not trigger a Level 2 Response in subsequent quarters. For example, assume sample results exceed the BOD5 action level in Q1 and Q2 and a Level 2 Response was undertaken at the end of Q2 that resulted in discharges below the action level in Q3, and again in Q4. As this condition is currently drafted, it could be argued that a Level 2 Response is again triggered in Q3, and then again in Q4, because two quarters (Q1 and Q2) of the prior four quarters showed results above action levels.

8. **Condition S4.C (Level Two Response): The Level Two Response should allow for greater flexibility and consideration of reasonableness and cost-effectiveness.**

As currently drafted, the proposed Level Two Response requires an investigation of "all available" BMP options, without any limitation or consideration of cost or reasonableness. It then requires implementation of – presumably (?) – all of those options identified, again without reference to reasonable, cost-effectiveness, practicality, or other considerations. This directive is inconsistent with adaptive management. Instead, a Level Two Response should allow for the evaluation of alternatives, selection and implementation of alternatives, monitoring of the

effectiveness of the implemented alternatives, and further refinement of those alternatives or selection of new alternatives based on the effectiveness of the alternatives.

Waste Management recommends the following revisions to this condition:

Action: The Permittee shall: 1) promptly identify the sources of stormwater contamination that are causing or contributing to the presence of the benchmark parameter,

2) investigate ~~all~~ reasonably available options of source control, operational control, and ~~stormwater treatment~~ best management practices to reduce stormwater ~~contaminant~~ contaminate levels below permit benchmark values,

3) implement additional reasonably available options for source and operational best management practices identified as part of this investigation, ...

This condition is also troubling because it provides no guidance in terms of how the investigation of source control options, operational control, or BMPs is to be performed, or how a permittee is to evaluate and select among the various options evaluated. Waste Management believes that the absence of guidance with respect to the Level Two Response (as well as the Level Three Response) is a fundamental problem with the Permit.

9. Condition S4.C (Level Three Response): The Level Three Response should be deleted.

Waste Management believes that the Level Three Response provisions are not warranted and are already addressed by the Level Two Response. As we understand the Level Two Response, the permittee is required to identify possible additional controls that might be implemented to reduce concentrations below benchmark values. If particular controls are not effective, further investigation would become necessary. This would appear to be the same pattern required for a Level Three Response.

10. Condition S4.C (Level Three Response): The Level Three Response should allow for greater flexibility.

If a Level 3 Response is triggered, stormwater treatment appears to be mandated even if other BMPs would reduce contaminants below benchmark values. Furthermore, the apparent mandate to require treatment ignores whether the treatment is necessary to achieve compliance with water quality standards, as well as feasibility or cost. While Waste Management recognizes that the Level 3 Response does provide the opportunity for a permittee to seek a waiver of "stormwater treatment best management practices", the Permit requires a showing that the treatment practices are "infeasible and not necessary for compliance with water quality standards due to unique site conditions." This required showing is too rigid. If a stormwater treatment BMP is "infeasible" or even impossible, how could Ecology also insist upon a showing that the treatment is "not necessary for compliance with water quality standards due to unique site conditions"? If the BMP is infeasible, then the waiver should issue, regardless of the second criteria. Conversely, if the BMP is not necessary for compliance with water quality standards, there should be no requirement to show

the BMP to be infeasible, as it is already shown to be unwarranted. Furthermore, this provision also does not appear to account for situations where discharges above action levels can be shown not to cause a violation of water quality standards, or where natural background conditions make achievement of action levels or benchmarks impossible.

Waste Management suggests the following revisions to this section:

Action: The Permittee shall: 1) promptly identify the sources of stormwater contamination that are causing or contributing to the presence of the benchmark parameter,

2) investigate all reasonably available options of source control, operational control, and ~~stormwater treatment~~ best management practices to reduce stormwater ~~contaminate~~ contaminant levels to or below permit benchmark values,

3) implement additional reasonably available options for source control, operational control, and best management practices ~~including stormwater treatment best management practices~~ identified as part of this investigation within twelve months of initiating the level three response,

4) prepare a level three source control report outlining actions taken, planned and scheduled to reduce stormwater ~~contaminate~~ contaminant levels ~~including stormwater treatment best management practices~~, and

5) submit the level three source control report to Ecology within twelve months of initiating a level three response.

6) The permittee may request a waiver from implementing additional ~~employing~~ stormwater ~~treatment~~ best management practices and/or other controls identified for reducing stormwater contaminant levels. The waiver request must be submitted to Ecology within 3 months of initiating the ~~a~~ level three response and must include an explanation why the implementation of ~~stormwater treatment~~ best management practices are infeasible or not reasonably available, whether the costs to implement the best management practices are reasonable, and whether the practices or controls are not necessary for compliance with water quality standards due to unique site conditions, and any other information the permittee believes to be relevant. The stormwater treatment waiver request must be reviewed and approved by Ecology as either a modification of permit coverage in accordance with condition S1.D, or through the issuance of an administrative order before the stormwater treatment waiver becomes effective.

11. Conditions S4 and S4.D: The Compliance Certification should not be required for visual monitoring reports that are maintained as part of the SWPPP.

The proposed revision to Condition S4 will require that each visual monitoring report must contain a certification that “in the judgment of the person doing the inspection the facility is in compliance or non-compliance with the SWPPP and the permit, and identifying any incidents of non-compliance.” The rationale for including the certification requirement is apparently the result of

September 27, 2004

a settlement agreement between Ecology and the Environmental appellants. Waste Management disagrees with including this requirement in the General Permit. *First*, neither 40 CFR § 122.44 nor WAC 173-220-210 requires certification of reports or documents that are not submitted to Ecology. In the Permit, visual monitoring reports are maintained with the SWPPP, but are not reported to Ecology; therefore, there should be no obligation to include the certification.

Second, in many instances, the person who does the inspection will not have the necessary authorization to sign a certification in compliance with Condition G17. Condition G17 – and its corresponding requirement under 40 CFR § 122.22(b) – requires that “a duly authorized representative” who signs a certification must meet three requirements:

- The authorization is made in writing;
- The authorization is submitted to Ecology;
- The duly authorized representative must have “overall responsibility” for the facility’s operations or its environmental matters.

In many instances, persons other than the facility operations or environmental manager will conduct visual monitoring. In that case, the person conducting the inspection could not meet the third criterion and could not sign the certification. Further delegation is not allowed. Accordingly, this Condition will limit the number of persons who can actually perform visual monitoring, which in turn will likely reduce the number of visual monitoring events – i.e., if a “duly authorized representative” is not on-site during a rainfall event, then the permittee would be excused from visual monitoring.

Third, the certification requirement in Condition G17 does not require that the person who actually conducted the inspection to sign the certification. It merely requires that the representative certify that the reports were prepared under his or her direction or supervision and that he or she has made inquiry as to the accuracy of the information presented.

Ecology should revise Condition S4 as follows:

... The results of visual monitoring will be recorded in writing, ~~signed according to General Condition G-17~~ and kept with the stormwater pollution prevention plan....

Ecology should revise Condition S4.D as follows:

...Quarterly, visual monitoring reports must be signed by the person making the observations ~~and if different, reviewed and also signed in accordance with condition G17~~ and shall include a certification that ~~in the judgment of the person doing the inspection the facility is in compliance or non-compliance with the SWPPP and the permit, and identifying any incidents of non-compliance....~~

12. Condition S4.D.1: Visual monitoring reports should not be made a part of the SWPPP.

While Waste Management does not disagree with the requirement that visual monitoring reports should be filed or stored along with the SWPPP, Waste Management disagrees with the

proposal that visual monitoring reports must be "attached to" the permittee's SWPPP. SWPPP's are intended to be a plan, not a collection of monitoring reports. Monitoring results, analytical results, and training records are typically maintained in a file that is not "attached to" or part of the SWPPP. If every monitoring report must be "attached to" the SWPPP, the SWPPP will in short order become a massive document. Waste Management recommends that the Permit require only that required monitoring records and other records be maintained at the permittee's facility in a form that can be readily reviewed, if requested by Ecology.

13. Condition S6.F: The Permit should include restrictions on requests for copies of the SWPPP.

Waste Management disagrees with the requirement that each permittee must provide a copy of its SWPPP to a member of the public who requests a copy. *First*, this obligation could impose a significant burden and cost on permittees, especially where other organizations and persons make multiple requests for copies. *Second*, the language of this condition is contradictory. On one hand, it requires the permittee to "provide a copy of the SWPPP as request"; on the other hand, it merely requires the permittee to notify the requestor where and when it can view the SWPPP. *Third*, the requirement that the permittee "will provide reasonable access to copying services for which a reasonable fee may be charged" is unreasonable. Does this mean that a facility that does not have a copy machine must now purchase one in order to accommodate a request for a copy of the SWPPP? Must a remotely-located facility make arrangements for transport and off-site copying of the SWPPP? Must a permittee allow a requestor access to its administrative offices for the purpose of copying the SWPPP? While Waste Management recognizes the interest the public has in reviewing SWPPPs, the company is concerned about the potential for abuse of the right to request a copy of a SWPPP. As a compromise, Waste Management suggests the following:

Upon the written request to the permittee from a member of the public, the Permittee shall, within a reasonable period of time, either provide a copy of its current SWPPP to the requestor or notify the requestor of a location at or near the facility, or at an Ecology Regional Office, where the SWPPP can be reviewed during normal business hours. The Permittee may require the requestor to pay in advance reasonable copying, handling, and mailing costs.

14. Condition S7.E.2: The Permit's standards for establishing BMPs as "demonstrably equivalent" are too stringent and will hinder development of alternative and effective BMPs.

Waste Management concurs with the proposal to include language establishing a presumption of compliance with water quality standards if a permittee is fully implementing its permit and associated BMPs. The permit also presumes compliance if the permittee is implementing BMPs that are "demonstrably equivalent" to those BMPs contained in storm water technical manuals. The Permit then sets forth five factors that must be shown to establish a BMP as "demonstrably equivalent." Waste Management believes that the proposed five factors are onerous, too burdensome, and may stifle the development of effective BMPs that might not otherwise be included in approved manuals. This condition requires that the SWPPP must document:

- a. The method and reasons for choosing the storm water best management practices selected;
- b. The pollutant removal performance expected from the practices selected;
- c. The technical basis supporting the performance claims for the practices selected, including any available existing data concerning field performance of the practices selected;
- d. An assessment of how the selected practices will comply with state water quality standards; and
- e. An assessment of how the selected practices will satisfy both applicable federal technology-based treatment requirements and state requirements to use all known, available, and reasonable methods of prevention, control, and treatment.

Often, a permittee might implement a simple BMP that is not listed in a technical manual but which would have obvious benefits for stormwater pollutant control. Yet, under the standards established above, the permittee would have to undertake a costly study to establish “pollutant removal performance”, to collect data on field performance elsewhere, to prove that the practices will comply with water quality standards, and verify that the practices will satisfy both applicable federal technology-based treatment requirements. Data to support such studies is often inconsistent, of varying quality, and cannot be readily compared. In addition, according to the authors of the EPA/ASCE National Stormwater BMP Database the use of “pollutant removal performance” as the only acceptable measure is reported to be problematic and can lead to significant errors in assessing BMP effectiveness. Furthermore, when an alternative BMP is use in addition to other BMPs, it is entirely unclear how this showing would be made. Would the single alternate BMP have to meet all criteria, or would the permittee have to demonstrate that the combination of BMPs would meet these criteria?

In other words, these requirements will require a major study to justify what might otherwise be a simple, common-sense BMP. Faced with the requirement to perform such a study, the permittee may simply forego it.

15. Condition S4.B.1: Ecology should clarify or define what is meant by “inactive and unstaffed.”

While Waste Management agrees with the proposal to allow for a monitoring exception for inactive and unstaffed sites, Waste Management suggests that Ecology provide further clarification as to the meaning of “inactive and unstaffed.” In addition, the monitoring exception should also allow for situations where the regulated activity that led to issuance of a stormwater permit has temporarily ceased, regardless of staffing levels. Waste Management does not understand this provision – based on the federal stormwater permit – to mean that no employees, contractors, security guards or other personnel might visit a site during a month. Rather, the provision is intended to “apply to these facilities where lack of personnel and locational impediments hinder the ability to conduct visual examinations (i.e., the ability to meet the time and representative rainfall sampling specifications).” 65 Fed. Reg. 64746, 64772 (Oct. 30, 2000). Waste Management suggests the following addition to this condition:

Inactive or unstaffed facilities where the permittee is unable to conduct benchmark monitoring, or where regulated industrial activities have temporarily ceased, may

seek a waiver of monitoring requirements. Facilities that are inactive and unstaffed during an entire quarter must notify Ecology at the beginning of the inactive period....

16. Condition S3.E.3: ESSB 6415 does not impose affirmative obligations on permittees.

Condition S3.E.3 purports to impose the ESSB 6415 requirements on existing facilities; however, the language quoted from ESSB imposes obligations on Ecology, not on permittees. Accordingly, this provision should be revised in order to avoid confusion as to what obligations are being imposed on permittees.

17. Condition S4.G: Ecology should clarify facilities discharging to TMDL waterbodies are required to undertake additional monitoring only for those parameters for which the TMDL contains numeric limits.

The Permit is unclear as to the monitoring obligations for facilities that discharge to TMDL waterbodies, but which do not have numeric limits. For example, if a facility discharges to a TMDL waterbody impaired for dissolved oxygen, yet the Appendix 5 List states that compliance with the permit constitutes compliance with the TMDL, is the facility nonetheless required to undertake monthly (or quarterly) sampling for dissolved oxygen? Ecology should clarify that additional monitoring is only required if Appendix 5 identifies a numeric limit for the particular parameter to be monitored.

18. Miscellaneous Corrections:

18.1. Condition S1.C.7 – Incorrectly cross-references to Condition S3.D. The correct reference is Condition S3.E.

18.2. Condition S4.A.3 - This section contains typographical errors and should be clarified. Waste Management suggests the following changes:

The storm event sampled should be at least 0.1 inches of rain in a 24-hour period. In the alternative, the storm event preceding sample collection should have an intensity equal to or greater than 0.1 inches per 24-hour. ~~to 0.1 inches or greater in a 24 hour period preceding sample collection~~

18.3. Condition S4.C - In several locations in this Condition, the verb “contaminate” is used as an adjective, e.g., stormwater contaminate levels. The verb “contaminate” should be replaced with “contaminant.”

19. General Comment: Ecology Should Adopt EPA’s Section/Paragraph Identification Scheme.

The General Permit’s scheme for numbering conditions and paragraphs makes it difficult and confusing to navigate through the permit. In 2000, EPA provided a good explanation of this problem:

September 27, 2004

Also note that the section/paragraph identification scheme of today's final MSGP has been modified from the 1995 MSGP. The original scheme utilized a sometimes lengthy combination of numbers, letters and Roman numerals (in both upper and lower cases) which many permittees found confusing. Today's reissuance identifies sections/ paragraphs, and hence permit conditions, using numbers only, except in Part 6 (which also incorporates the sector letters from the 1995 MSGP for consistency). Under the original permit, only the last digit or letter of the section/paragraph identifier appeared with its accompanying section title/ paragraph, making it difficult to determine where you were in the permit. In today's reissuance, the entire string of identifying numbers is listed at each section/paragraph to facilitate recognizing where you are and in citing and navigating through the permit. For example, paragraph number 1.2.3.5 tells you immediately that you are in Part 1, section 2, paragraph 3, subparagraph 5; whereas under the 1995 MSGP you would only see an "e", thereby forcing you to hunt back through the permit to determine that you were in Part I.B.3.e.

65 Fed. Reg. 64746, 64747 (Oct. 30, 2000). Waste Management suggests that Ecology adopt the same approach.

* * *

Waste Management appreciates the opportunity to provide these comments. If you have any questions, please feel free to call me at (206) 264-3062.

Sincerely,

/mailed copy signed/

Andrew M. Kenefick

L.L. re Comments on Stormwater Permit (9/27/04)